A

Public Prosecutor v Jarizal bin Jasni

B HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO WA-41H(A)-1–05 OF 2022
NOORIN BADARUDDIN J
7 AUGUST 2023

C *Criminal Procedure — Appeal — Appeal against discharge and acquittal — Respondent charged under s 15(1)(a) of Dangerous Drugs Act 1952 for administering drugs to himself — Respondent discharged and acquitted by magistrate — Whether charge was defective — Whether manner in which urine sample was collected from respondent was legal — Whether evidence vis a vis urine*
D *sample obtained from respondent even if it was illegally obtained, was admissible on ground that it was relevant — Whether two urine sample bottles ought to have been obtained from respondent — Dangerous Drugs Act 1952 ss 15(1)(a) & 31A*

E On 30 November 2019 at around 3.15am, a team of police officers led by SP2 conducted a raid at an entertainment centre ('the premise') where 143 individuals, including the respondent, were made to undergo a preliminary urine test. The respondent was accompanied by one detective sergeant major ('SP4') to the washroom at the premise where he gave his urine sample. He surrendered the bottle containing his urine sample to SP2 who conducted a
F preliminary screening test. The respondent's urine sample tested positive for amphetamine. The respondent's urine sample bottle was handed over to a science officer ('SP3') who conducted gas chromatography mass spectrometry confirmation test and drugs type 3,4-methylenedioxymethamphetamine ('MDMA') was found from the same urine sample. The respondent was
G charged under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') at the magistrate's court. At the close of the prosecution's case, the magistrate found that the prosecution had failed to prove a prima facie case against the respondent. The respondent was therefore acquitted and discharged on the grounds that: (a) the following preconditions were not fulfilled and as such the
H statutory presumption under s 37(k) of the DDA did not apply: (i) the respondent was already arrested before he was directed to give his urine sample; and (ii) the police ought to have taken the respondent to the nearest hospital or requested some assistance from any medical officer for the urine sample to be taken pursuant to s 31A of the DDA and the preliminary screening test to be
I conducted at the police narcotics office; and (b) two bottles of urine sample ought to have been obtained from the respondent since there were two different results from the same bottle of the respondent's urine sample. Hence, this appeal by the prosecution. At the outset, the respondent alerted the court that the charge preferred against him was defective as the date was stated to be

30 November 2020, instead of 30 November 2019. A

Held, dismissing the appeal:

(1) The respondent had not shown or established that he was misled by the error or omission. The date was just a small error curable under s 422 of the Criminal Procedure Code and it could not be gainsaid that the mistake as to the date in the charge had occasioned a failure of justice or that the respondent was misled by such error or omission. The respondent was able to understand and conduct the case as in the nature and substance of the offence that was preferred against him (see para 20). B C

(2) Section 31A(1A) of the DDA specifically gave limited power to the police officer to facilitate a medical examination, ie to obtain a urine specimen from an arrested person. Arrested person appeared to be a pre-condition to s 31A(1) and 31A(1A) of the DDA. The respondent could not be said to be under constructive arrest just because he was escorted to the washroom by SP4 to give his urine sample. This was not the case where at the time the respondent was instructed to give his urine sample, he was arrested on a charge of committing an offence against the DDA or alleged to have been committed under such circumstances. This was a random examination conducted by the police during a raid and arrest would only take place if evidence of offence under s 15(1)(a) of the DDA was obtained. The respondent was only suspected to have committed an offence against the DDA after he had given his urine sample and hence the arrest only took place thereafter. Section 31A of the DDA was not merely procedural. The learned magistrate did not err in finding that there was no arrest made on the respondent prior to giving his urine sample. As such the actions taken by the police breached s 31A(1) and 31A(1A) of the DDA (see paras 22 & 29–31). D E F

(3) The discretion to admit illegally obtained evidence could not be exercised as the evidence procured was in breach of the specific provision ie s 31A and 31A(1A) of the DDA. Further, the admission of the urine sample even if it was obtained illegally would be prejudicial to the respondent on the ground that the respondent had raised a defence at the prosecution stage that he had consumed the soft drinks containing drugs which were made available at the table where he and his friends were at when they came over to the premise. The learned magistrate had not erred in accepting the defence's version that there was evidence where inference could be made that dangerous drugs were added to the soft drinks consumed by the respondent without his knowledge. It could not be said that the respondent's version could not be true. The prosecution must disprove this important part of the respondent's version of the facts which they did not. In those circumstances there was doubt as to whether the respondent did consume or administer dangerous drugs type MDMA to G H I

himself with mens rea or by statutory presumption. Accordingly, the respondent was rightly acquitted at the close of the prosecution case (see paras 33–34 & 39).

(4) No explanation was proffered by SP3 as to whether amphetamine and MDMA were the same type of drugs as well as to why or what could be the possibility as to the difference in the findings of the type of drugs during the preliminary screening test and the gas chromatography mass spectrometry test. No efforts on the part of the prosecution to explain these discrepancies through their witnesses. Therefore, the court could not find fault in the findings of facts made by the learned magistrate in discharging and acquitting the respondent of the charge against him. There was no error that warranted appellate intervention (see paras 41–42).

[Bahasa Malaysia summary

Pada 30 November 2019 kira-kira jam 3.15 pagi, sepasukan anggota polis diketuai SP2 telah melakukan serbuan di sebuah pusat hiburan ('premis') di mana 143 individu termasuk responden telah menjalani ujian awal air kencing. Responden telah ditemani oleh seorang sarjan detektif mejar ('SP4') ke bilik air di premis di mana dia memberikan sampel air kencingnya. Dia menyerahkan botol berisi sampel air kencingnya kepada SP2 yang menjalankan ujian saringan awal. Sampel air kencing responden didapati positif amphetamine. Botol sampel air kencing responden telah diserahkan kepada pegawai sains ('SP3') yang menjalankan ujian pengesahan spektrometri jisim kromatografi gas dan dadah jenis 3,4-methylenedioxymethamphetamine ('MDMA') didapati daripada sampel air kencing yang sama. Responden didakwa di bawah s 15(1)(a) Akta Dadah Berbahaya 1952 ('ADB') di mahkamah majistret. Pada penutupan kes pendakwaan, majistret mendapati pihak pendakwaan gagal membuktikan kes prima facie terhadap responden. Oleh itu, responden telah dibebaskan dan dilepaskan atas alasan bahawa: (a) prasyarat berikut tidak dipenuhi dan oleh itu anggapan statutori di bawah s 37(k) ADB tidak terpakai: (i) responden telah pun ditangkap sebelum dia diarahkan untuk memberikan sampel air kencingnya; dan (ii) polis sepatutnya membawa responden ke hospital terdekat atau meminta bantuan daripada mana-mana pegawai perubatan untuk sampel air kencing diambil menurut s 31A ADB dan ujian saringan awal akan dijalankan di pejabat polis narkotik; dan (b) dua botol sampel air kencing sepatutnya diperoleh daripada responden kerana terdapat dua keputusan yang berbeza daripada botol sampel air kencing responden yang sama. Oleh itu, rayuan ini oleh pihak pendakwaan. Pada awalnya, responden memaklumkan mahkamah bahawa pertuduhan yang dikenakan terhadapnya adalah cacat kerana tarikh dinyatakan pada 30 November 2020, bukannya 30 November 2019.

Diputuskan, menolak rayuan:

(1) Responden tidak menunjukkan atau membuktikan bahawa dia telah diperdayakan oleh kesilapan atau peninggalan tersebut. Tarikh itu hanyalah kesilapan kecil yang boleh diperbetulkan di bawah s 422 Kanun Tatacara Jenayah dan tidak boleh dinafikan bahawa kesilapan mengenai tarikh dalam pertuduhan telah menyebabkan kegagalan keadilan atau bahawa responden telah diperdayakan oleh kesilapan atau peninggalan tersebut. Responden dapat memahami dan menjalankan kes seperti dalam sifat dan intipati kesalahan yang dikenakan terhadapnya (lihat perenggan 20).

(2) Seksyen 31A(1A) ADB secara khusus memberi kuasa terhad kepada pegawai polis untuk memudahkan pemeriksaan kesihatan, iaitu mendapatkan spesimen air kencing daripada orang yang ditangkap. Orang yang ditahan merupakan pra-syarat kepada s 31A(1) dan 31A(1A) ADB. Responden tidak boleh dikatakan dalam tangkapan konstruktif hanya kerana dia diiringi SP4 ke tandas untuk memberikan sampel air kencingnya. Ini bukan kes di mana pada masa responden diarahkan untuk memberikan sampel air kencingnya, dia telah ditangkap atas pertuduhan melakukan kesalahan terhadap ADB atau didakwa telah dilakukan dalam keadaan sedemikian. Ini adalah pemeriksaan rambang yang dijalankan oleh polis semasa serbuan dan tangkapan hanya akan berlaku jika bukti kesalahan di bawah s 15(1)(a) ADB diperolehi. Responden hanya disyaki melakukan kesalahan terhadap ADB selepas dia memberikan sampel air kencingnya dan oleh itu tangkapan hanya berlaku selepas itu. Seksyen 31A ADB bukan sekadar prosedur. Majistret yang bijaksana tidak terkhilaf apabila mendapati tiada tangkapan dibuat terhadap responden sebelum memberikan sampel air kencingnya. Oleh itu, tindakan yang diambil oleh polis melanggar ss 31A(1) dan 31A(1A) ADB (lihat perenggan 22 & 29–31).

(3) Budi bicara untuk menerima keterangan yang diperoleh secara tidak sah tidak boleh dilaksanakan kerana keterangan yang diperoleh adalah melanggar peruntukan khusus iaitu s 31A dan 31A(1A) ADB. Selanjutnya, penerimaan sampel air kencing walaupun ia diperoleh secara tidak sah akan memudaratkan responden atas alasan responden telah membangkitkan pembelaan di peringkat pendakwaan bahawa dia telah mengambil minuman ringan yang mengandungi dadah yang disediakan di meja di mana dia dan rakan-rakannya berada ketika mereka datang ke premis itu. Majistret yang bijaksana tidak terkhilaf menerima versi pembelaan bahawa terdapat keterangan di mana inferens boleh dibuat bahawa dadah berbahaya telah ditambah ke dalam minuman ringan yang diambil oleh responden tanpa pengetahuannya. Tidak boleh dikatakan bahawa versi responden tidak benar. Pihak pendakwaan mesti menafikan bahagian penting fakta versi responden yang tidak mereka buktikan. Dalam keadaan tersebut terdapat keraguan sama ada responden telah mengambil atau mengendalikan dadah berbahaya jenis

MDMA kepada dirinya sendiri dengan mens rea atau dengan anggapan berkanun. Sehubungan itu, responden telah dengan betul dibebaskan pada penutupan kes pendakwaan (lihat perenggan 33–34 & 39).

(4) Tiada penjelasan dikemukakan oleh SP3 sama ada amphetamine dan MDMA adalah jenis dadah yang sama serta mengapa atau apakah kemungkinan perbezaan penemuan jenis dadah semasa ujian saringan awal dan ujian spektrometri jisim kromatografi gas. Tiada usaha di pihak pendakwaan untuk menjelaskan percanggahan ini melalui saksi mereka. Oleh itu, mahkamah tidak dapat mencari kesalahan dalam penemuan fakta yang dibuat oleh majistret yang bijaksana dalam melepaskan dan membebaskan responden daripada pertuduhan terhadapnya. Tiada kesilapan yang memerlukan campur tangan rayuan (lihat perenggan 41–42).]

Cases referred to

Aizuddin Syah bin Ahmad v PP [2018] 5 MLJ 220; [2019] 3 CLJ 318, CA (folld)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)
Kuruma, Son of Kaniu v The Queen [1955] AC 197 (refd)
Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan [2018] 4 MLJ 139; [2019] 4 CLJ 767, CA (refd)
PP v Ahmad Saiful Islam bin Mohamad [2023] 2 MLJ 950; [2023] 2 CLJ 714, CA (refd)
Pendakwa Raya lwn Mohd Safwan bin Husain [2017] 5 MLJ 255; [2017] 7 CLJ 685, CA (refd)
R v Sang [1980] AC 402, HL (refd)

Legislation referred to

Criminal Procedure Code ss 112, 156, 399, 422
Dangerous Drugs Act 1952 ss 15(1), (1)(a), 31, 31A, 31A(1), (1A), 37(k), First Schedule

Mohamad Shahrizzat bin Amadan (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Azmi bin Talib (Aidil Effendy Azmi & Co) for the respondent.

Noorin Badaruddin J:

[1] The respondent was charged under s 15(1)(a) of the Dangerous Drugs Act 1952 ('the DDA') at the Magistrate's Court Kuala Lumpur. The charge against the respondent reads:

> Bahawa kamu pada 30.11.2020 jam lebih kurang 3.15 pagi bertempat di tandas lelaki pusat hiburan GN Diversided Sdn Bhd @ Mankar No 13, 15 & 17, Asian Heritage Row, Jalan Doraisamy, dalam daerah Dang Wangi Wilayah Persekutuan,

Kuala Lumpur, telah didapati memberi kepada diri sendiri dadah berbahaya iaitu jenis Methylmedioxymethamphetamine (MDMA). Oleh itu kamu telah melakukan kesalahan di bawah seksyen 15(1) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen yang sama.

[2] Five witnesses were called by the prosecution to give evidence before the magistrate court. At the close of the prosecution case, the magistrate found that the prosecution has failed to prove a prima facie case against the respondent. The respondent was therefore acquitted and discharged. Aggrieved with the decision, the public prosecutor appealed.

THE CASE FOR THE PROSECUTION

[3] On 30 November 2019 at around 3.15 am, a team from the Criminal Investigation Narcotic Division, Dang Wangi Police Headquarters led by one ASP Hisam bin Abu ('SP2') conducted a raid at an entertainment centre known as Pusat Hiburan GN Diversified Sdn Bhd @ Mankar, No 13, 15 and 17, Asian Heritage Row, Jalan Doraisamy, 50300 Kuala Lumpur ('the premise').

[4] At the premise, a total of 143 individuals were made to undergo a preliminary urine test including the respondent.

[5] The respondent was told by SP2 that a urine test would be conducted on him and that he was free to choose the bottle for the urine sample collection. The respondent has chosen a bottle with a serial number 0449741. The respondent was then accompanied by one detective Sergeant Major, D/SM Letchumanarajan ('SP4') to the washroom at the premise where he gave his urine sample. The respondent surrendered the bottle containing his urine sample to SP2 at the documentation table and opened the cover of the bottle in front of SP2.

[6] SP2 then conducted a preliminary screening test by dipping five test strips of Meth/Mop/THC/Ket/Amp into the respondent's urine sample. The preliminary screening test was conducted in the presence of both the respondent and SP4.

[7] The respondent's urine sample tested positive for amphetamine and the respondent was informed of the same. The respondent was then asked by SP2 to close the bottle lid.

[8] SP2 proceeded to do the necessary marking on the sticker label of the bottle. The respondent's details and his signature were penned down on the

label of the bottle. SP2 then sealed the bottle by placing a blue sticker around the bottle lid and also on the bottle with the serial number 0449741.

[9] Both the respondent and SP2 (marked as the sample collector) placed their signatures on the bottle and on the 'Borang Permintaan Ujian Pengesanan Dadah dalam Air Kencing'. SP2 lodged a police report regarding the raid.

[10] On the same day at around 10.30am, SP2 handed over the following exhibits to the investigating officer, Inspector Nur Nurul Alia bt Ab Aziz ('SP5'):

(a) Police Report Dang Wangi/032621/19 (P4);

(b) UPD Form 9 (P6);

(c) respondent's urine sample bottle (P2(a)-(c)); and

(d) *borang serah menyerah* (P5).

[11] SP5 further instructed for photographs of the urine sample bottle be taken and the said bottle was kept in a refrigerator at her office for safekeeping thereafter.

[12] On 2 December 2019, at around 3.30pm, SP5 took the urine sample bottle as in exhs P2 and P6 to the Drug Laboratory and Research Unit at the Kuala Lumpur Hospital and handed over both exhs P2 and P6 to one Mr Eng Choon Siang, a science officer (biochemistry) (SP3). On the same day, SP3 conducted a preliminary test using the immunoassay method with the chemistry apparatus called COBAS6000 on the respondent's urine sample with the laboratory reference number 9563617 2019. The respondent's urine sample was tested positive with amphetamine type stimulants (ATS). The urine sample bottle then was kept in a refrigerator designated with the temperature of 2–8 degrees celsius with SP3 being the only person having custody of the urine sample bottle.

[13] On 6 December 2019, SP3 conducted a confirmation test using the gas chromatography mass spectrometry by using the GCMS AGILENT apparatus on the respondent's urine sample and found the specimen to be positive of drugs type 3,4-methylenedioxymethamphetamine (MDMA), a dangerous drug listed in the First Schedule of the Dangerous Drugs Act 1952.

[14] On 7 December 2019, SP3 handed over his report under s 399 of the Criminal Procedure Code ('the CPC') to SP5 and the report was marked as P7.

FINDINGS OF THE MAGISTRATE COURT AT THE CLOSE OF THE PROSECUTION CASE

[15] Summarily, the learned magistrate acquitted the respondent on the following grounds and these grounds were the main contentions raised by the prosecution in their petition.

[16] Firstly, the learned magistrate was of the view that these preconditions have not been fulfilled and as such the statutory presumption under s 37(k) of the Dangerous Drugs Act 1952 does not apply to the present case:

(a) that the respondent was already arrested before he was directed to give his urine sample; and

(b) that the police (ought to) have taken the respondent to the nearest hospital or had requested some assistance from any medical officer for the urine sample to be taken pursuant to s 31A of the Dangerous Drugs Act 1952 and the preliminary screening test to be conducted at the police narcotic office.

[17] Secondly, the learned magistrate was of the view that two bottles of urine sample ought to have been obtained from the respondent since there were two different results from the same bottle of the respondent's urine sample. The respondent's urine sample was tested positive for amphetamine from the preliminary screening test conducted by SP2 at the premise whilst from the gas chromatography mass spectrometry confirmation test conducted by SP3, drugs type MDMA was found from the same urine sample. The learned magistrate further stated as follows:

> Mahkamah berpendapat dua botol air kencing adalah diperlukan bagi memastikan tiada 'miscarriage of justice'. Sekiranya dua botol digunakan bagi tujuan ujian pengesanan dadah dalam air kencing maka keraguan ini dapat dielakkan dan dapat mengelakkan risiko sampel air kencing OKT daripada tercemar memandangkan ahli patologi akan dapat melakukan ujian pengesanan dadah dalam air kencing pada botol kedua.

FINDINGS

[18] At the outset, it must be stated that during oral submission, this court was alerted by the learned defence counsel that the charge preferred against the respondent is defective as the date was stated to be 30 November 2020, instead of 30 November 2019, the latter being the correct date the raid took place. The learned counsel admitted that he realised the defect just recently, prior to the oral submission date fixed before this court. The learned counsel stated that no effort was taken by the prosecution to amend the charge throughout the trial before the magistrate court.

[19] It has been provided under s 156 of the Criminal Procedure Code that no error in stating or omitting to state the offence or the particulars in the charge shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission. Further, s 422 of the Criminal Procedure Code is a general provision for a cure for any error, omission or irregularity in the charge unless it occasion a failure of justice.

[20] The respondent herein or at the court below has not shown or establish that he was misled by the error or omission. This court finds that the date is just a small error curable under s 422 of the Criminal Procedure Code and from the notes of proceedings, it cannot be gainsaid that the mistake as to the date in the charge has occasioned a failure of justice or that the respondent was misled by such error or omission. The notes of proceedings demonstrate that the respondent and his counsel was able to understand and conduct the case as in the nature and substance of the offence that was preferred against the respondent.

[21] The main contention in the present matter relates to the question as to whether the manner in which the urine sample was collected from the respondent is legal. The relevant provision is s 31A of the Dangerous Drugs Act 1952. Subsections 31A(1) and 31A(1A) Dangerous Drugs Act 1952 state:

> 31A Examination of arrested person by a medical officer
>
> (1) When any person is arrested on a charge of committing an offence against this Act:
>
> (a) which is of such a nature; or
>
> (b) which is alleged to have been committed under such circumstances, as give reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence against this Act, it shall be lawful for a medical officer acting at the request of any police officer not below the rank of Sergeant, or any other officer in charge of a police station, or any officer of customs, and for any person acting in aid of a medical officer and under his direction, to make such an examination or examinations of the person arrested as may be reasonably necessary in order to ascertain the facts which may afford such evidence, and to use or cause to be used such force as may be reasonably necessary for that purpose.
>
> (1A) For the purpose of preservation of evidence, it shall be lawful for a police officer not below the rank of Sergeant or an officer of customs to require an arrested person to provide a specimen of his urine for the purposes of an examination under subsection (1) if it is not practicable for the medical officer or the person who is acting in aid of or on the direction of a medical officer to obtain the specimen of the urine within a reasonable period.

[22] Section 31A of the Dangerous Drugs Act 1952 provides lawfulness of

actions taken by officers or listed persons to conduct examination on arrested person. Section 31A(1A) of the Dangerous Drugs Act 1952 specifically gives limited power to the police officer to facilitate a medical examination, ie to obtain a urine specimen from an arrested person. Arrested person appears to be a pre-condition to s 31A(1) and 31A(1A) of the Dangerous Drugs Act 1952. The prosecution in their petition of appeal contends that the learned magistrate has erred in finding that the procedure under s 31A of the Dangerous Drugs Act 1952 has not been complied with as the respondent was not under arrest or an arrested person before his urine sample was taken. It is argued that the respondent was under a constructive arrest by the fact that SP2 had instructed SP4 to escort the respondent to the washroom for his urine sample to be taken, hence the collection of the respondent's urine sample is legal pursuant to s 31A(1A) Dangerous Drugs Act 1952.

[23] The law on arrest is settled. The Court of Appeal in *Pendakwa Raya lwn Mohd Safwan bin Husain* [2017] 5 MLJ 255; [2017] 7 CLJ 685 had stated that whether a person is arrested or otherwise depends on the facts and circumstances of each case. The Court of Appeal through the judgment of Abdul Karim Abdul Jalil JCA (as His Lordship then was) stated as follows:

> [28] ... Setelah meneliti kes-kes di atas, kami bersetuju dengan pandangan bahawa pendekatakan-pendekatan tersebut sukar untuk diseragamkan (*reconcile*) dan agak malang (*unfortunate*) untuk digunakan seperti mana dikatakan oleh YA Abdul Hamid Mohamad H (ketika itu) dalam *Public Prosecutor v Abdul Rahim Kalandari Mustan*, Pada kami, dalam semua perundangan yang berkenaan sama ada dalam KPJ atau pun dalam ADB 1952, apa yang perlu ditentukan adalah sama ada telah berlakunya satu tangkapan atau tidak. *Kami berpendapat penentuan isu tersebut akan bergantung pada fakta dan keadaan sesuatu kes itu. Inilah prinsip am yang terpancar daripada pertimbangan kes-kes di atas*. (Emphasis added.)

[24] Based on the principle stated in the above, the Court of Appeal in *Pendakwa Raya lwn Mohd Safwan bin Husain* found that there were sufficient facts and evidence showing that at the time when the respondent therein was directed to give his urine sample, he was already arrested for purpose of s 31(1A) of the Dangerous Drugs Act 1952.

[25] The Court of Appeal in that case reminded that the power of arrest by the police is not prescribed under s 31A of the Dangerous Drugs Act 1952 but instead under s 31 of the Dangerous Drugs Act 1952 wherein any police officer or any officer of customs may arrest without a warrant any person whom he reasonably believes to have committed or to be committing an offence against the DDA. To justify reasonable believe that an offence has been committed there ought to have been an information received by the police beforehand as evidence to determine the issue of arrest. In *Pendakwa Raya lwn Mohd Safwan bin Husain*, evidence was adduced showing that the police in that case had

A acted on information received as to the respondent's involvement on drugs abuse at the police station where he was attached to. In other words, the police in that case was already targeting to arrest the respondent therein by making sure that he was working on the day the raid was conducted. The Court of Appeal was satisfied that in that case, the respondent was already arrested at the B time when he was detained and instructed to give his urine sample. The finding was corroborated by the police report which disclosed that the police was acting based on the information received relating to a police personnel involved in drugs abuse activity.

C **[26]** The findings of the Court of Appeal in *Pendakwa Raya lwn Mohd Safiwan bin Husain* is reproduced:

> [34] Berlandaskan prinsip am di atas, kami mendapati adanya cukup fakta dan keadaan dalam kes ini yang menunjukkan bahawa pada masa responden diarah D memberikan spesimen air kencingnya, dia sudah pun ditangkap bagi maksud s 31A(1A) Akta Dadah Berbahaya 1952. Harus dicatatkan di sini bahawa s 31A tidak memperuntukkan kuasa menangkap kepada pegawai polis. Kuasa tersebut diberikan dalam s 31 Akta Dadah Berbahaya 1952. Seksyen 31 memberikan kuasa tangkapan jika terdapat kepercayaan yang munasabah bahawa sesuatu kesalahan di bawah ADB 1952 telah dilakukan atau akan dilakukan. Ini mewajarkan E pengemukaan maklumat yang diterima (*information received*) oleh pihak polis sebagai keterangan untuk menentukan isu tangkapan ini (rujuk kes *Raissi v Metropolitan Police Commissioner* [2009] 3 All ER 14 dan *Shaaban & Ors v Chong Fook Kam & Anor*). Keterangan SP2, sama ada semasa pemeriksaan utama atau pemeriksaan balas, dengan jelas menunjukkan SP2 dan kumpulannya telah F bertindak atas maklumat penyalahgunaan dadah oleh suspek iaitu responden, di tempat dia bekerja iaitu sebagai pegawai balai di Balai Polis Kuala Perlis. Sebelum pergi ke balai tersebut, SP2 telah terlebih dahulu menghubungi balai dan memastikan responden bertugas pada hari serbuan. Setibanya di balai tersebut, SP2 telah memperkenalkan dirinya sebagai sub inspektor narkotik dan telah memaklumkan kedatangan mereka adalah untuk menahan, mengambil dan G membuat ujian saringan air kencing ke atas responden. Responden kemudiannya diarahkan untuk menyediakan air kencingnya di tandas balai dengan diiringi dan diperhatikan oleh SP2 dan Koperal Asmadi. SP2 dengan jelas mengatakan responden merupakan sasaran (suspek) serbuan itu dan tiada orang lain yang berada di balai ketika itu. Pada masa yang sama, kumpulan SP2 yang lain telah juga H menggeledah kereta responden. Setelah strip ujian ke atas air kencing responden menunjukkan keputusan positif methampethamine, responden telah dibawa ke IPK Pedis untuk tindakan selanjutnya. Dalam keadaan di atas, dan walaupun responden dikatakan memberikan kerjasama, dan sebagai seorang anggota polis sokongan, namun kebebasannya telah disekat dan dia telah dipaksa untuk I mengikuti segala arahan yang diberikan- rujuk kes *Alderson v Booth* [1969] 2 QB 216 yang memutuskan '*Held (1) that an arrest was constituted when any form of words was used which, in the circumstances, were calculated to and did bring to the notice of a defendant that he was under compulsion to which he thereafter submitted*'. Dalam keadaan di atas, kami dapati responden telah ditangkap sebaik sahaja dia ditahan dan diarahkan memberikan spesimen air kencingnya. Hal keadaan ini disokong

oleh laporan polis SP2, P6, yang dengan jelas menyatakan:

> Bertindak atas maklumat pada 06 Mei 2014, jam lebih 0930 hrs bertempat dibalai polis Kuala Perils saya mengetuai sepasukan anggota cawangan narkotik IPK Pedis terdiri dari D/KPL 104368, 124516, 140542, 142263 dan L/KPL 173072 setelah saya memperkenalkan diri 'polis' dengan mempamerkan kad kuasa telah menahan seorang anggota konst/sokongan Balai Polis Kuala Pedis kerana disyaki terlibat dalam aktiviti penyalahgunaan dadah.
>
> Setelah suspek berada dalam kawalan dan memberikan kerjasama saya telah membuat pemeriksaan fizikal ke atas suspek dan pemeriksaan ke atas kereta suspek jenis proton wira warna kelabu nombor pendaftaran PDJ 9002 yang diletakkan di hadapan balai tetapi tidak menjumpai apa apa barang yang menyalahi undang-undang. Seterusnya saya dengan dibantu oleh D/KPL 124516 telah membuat ujian saringan awal polis ke atas suspek dengan menggunakan botol urine nombor siri S/N 0152174 keputusan ujian saringan awal polis dapati air kencing suspek positif methampthemine. Saya tangkap suspek dan telah menerangkan hak hak suspek untuk menghubungi keluarga serta peguam seperti mana peruntukan s 28A Kanun Tatatcara Jenayah dalam bahasa melayu dan telah diakui faham oleh suspek. (Penekanan ditambah.)

[35] *Kami berpendapat fakta dan keadaan di sini amat jelas terutamanya penahanan telah dibuat berasaskan maklumat berkenaan satu kesalahan di bawah ADB 1952 yang telah dilakukan oleh responden, dan penahanan itu bukanlah suatu tindakan sekadar untuk membuat pertanyaan ke atas responden. Responden tidak bebas malahan telah mengikut apa yang diarahkan oleh SP2*. Selaras dengan s 15 Kanun Tatacara Jenayah dan penjelasan dalam kes *Shaaban & Ors v Chong Fook Kam & Anor*, *Holgate-Mohammed v Duke*, serta kes yang dirujuk dan setelah mempertimbangkan secara keseluruhan keadaan ini, kami berpendapat semasa spesimen air kencing responden diambil bagi tujuan pemeliharaan dan pemeriksaan di bawah s 31A(1) dan (1A) Akta Dadah Berbahaya 1952, responden merupakan seorang yang telah ditangkap dan orang tangkapan (*an arrested person*) dalam maksud peruntukan tersebut. (Emphasis added.)

[27] Returning to the present matter, the learned magistrate relied on the evidence given by the police ie SP2 who had testified that during the raid, arrest would only take place if there is an offence committed. This can be gleaned from the following SP2's evidence:

> PB: Setuju saya cadangkan pemeriksaan itu bukan tangkapan. Periksa dahulu tangkap kemudian?
>
> SP2: Ya, bila ada kesalahan baru kita tangkap.

[28] The finding of the learned magistrate that there was no arrest as yet before the collection of the respondent's urine sample is further corroborated by the police report lodged by SP2 which states that the respondent was arrested after his urine sample was obtained and suspected to have administer drugs to himself:

A Hasil ujian saringan awal polis yang saya jalankan di hadapan suspek dengan menggunakan test strip meth/mop/thc/ket/amp didapati air kencing suspek positif amp. Seterusnya saya tangkap suspek kerana disyaki memasukkan dadah ke dalam tubuh badan sendiri.

B **[29]** It is of the considered view that the respondent cannot be said to be under constructive arrest just because he was escorted to the washroom by SP4 to give his urine sample because the facts and circumstances of the case did not reveal that this is a situation where the police had suspected the respondent or any of the 143 individuals at the premise having already consumed drugs and C it was therefore imperative that the urine sample be obtained immediately before all traces of the drug disappear from their bodies. This is not the case where at the time the respondent was instructed to give his urine sample, he was arrested on a charge of committing an offence against the DDA or alleged to have been committed under such circumstances, as give reasonable grounds for D believing that an examination of his person will afford evidence as to the commission of an offence against the DDA.

[30] This court finds the facts and circumstances of the case shows that this E is a random examination conducted by the police during a raid and arrest would only take place if evidence of offence under s 15(1)(a) of the Dangerous Drugs Act 1952 was obtained. The respondent was only suspected to have committed an offence against the DDA after he has given his urine sample and hence the arrest only took place thereafter.

F

[31] This court is of the considered view that s 31A of the Dangerous Drugs Act 1952 is not merely procedural. Evidential burden is on the prosecution to prove that the person is/was arrested before the taking of the urine sample under s 31A(1A) of the Dangerous Drugs Act 1952. Based on the testimony G given by the prosecution's witnesses, facts and circumstances of the case, this court finds that the learned magistrate did not err in finding that there was no arrest made on the respondent prior to giving his urine sample. As such the actions taken by the police breached the provision of s 31A(1) and 31A(1A) of the Dangerous Drugs Act 1952.

H

[32] The next question is, whether the evidence vis a vis the urine sample obtained from the respondent even if it is illegally obtained, is admissible on the ground that it is relevant. In following the jurisprudence advocated in *R v Sang* [1980] AC 402 the Court of Appeal in *Hanafi bin Mat Hassan v* I *Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269 had stated that the court has no discretion to refuse to admit evidence on the ground that it was illegally obtained if it is relevant. However it is apposite to be reminded that the court has also a discretion to exclude evidence which may be prejudicial more so when the prejudicial effect outweighs its probative value (see: *Kuruma, Son*

of Kaniu v The Queen [1955] AC 197). A

[33] This court is of the considered view that the discretion to admit illegally obtained evidence in this case cannot be exercised as the evidence procured was in breach of the specific provision ie s 31A and 31A(1A) of the Dangerous Drugs Act 1952 and the said breach cannot be overcome by the principles set out in *Kuruma, Son of Kaniu v The Queen* and *R v Sang*. This court is guided by the decision in *Aizuddin Syah bin Ahmad v Public Prosecutor* [2018] 5 MLJ 220; [2019] 3 CLJ 318, where the Court of Appeal stated as follows: B

> [13] *When an Act sets out a particular procedure, that procedure must be meticulously followed and common law cases cannot override the provision of the Act as well as the supremacy of the Constitution*. C
>
> [14] In the instant case, the Act specifically states how the evidence must be procured. *Courts however, on many occasions have thrown out evidence when it was obtained in breach of specific provision of the Act*. For example, confessions statement under s. 113 of the repealed Criminal Procedure Code (see Janab's *Key To Criminal Procedure Code* (3rd Ed) pp 431–448). D
>
> [15] We have read the appeal records and the able submission of learned counsel for the appellant as well as the learned deputy public prosecutor. After giving much consideration, we took the view that the appeal must be allowed. Our reasons, inter alia, are as follows: E
>
> (a) in the instant case, it is not in dispute that there was a breach of s 31A(1A) of DDA 1952. The said breach cannot be overcome by the principles set out in the common law case of *R v Karuma* as well as *R v Sang*; F
>
> (b) *a provision of criminal statute must be strictly followed failure will amount to breach of rule of law*; and
>
> (c) this is a fit and proper case for the urine sample to be excluded and/or expunged from the evidence. By doing so, there will not be any incriminating evidence sufficient to convict the accused. (Emphasis added.) G

[34] It is further found that the admission of the urine sample even if it is obtained illegally would be prejudicial to the respondent on the ground that the respondent had raised a defence at the prosecution stage that he had consumed the soft drinks containing drugs which were made available at the table where he and his friends were at when they came over to the premise. The evidence led during cross-examination demonstrates that the respondent was invited to go to the premise by his friend one police constable by the name of Che Muhammad Azrani bin Che Abdullah. At the premise, the respondent and his friend Che Muhammad Azrani bin Che Abdullah were invited to drink by the latter's friends. There were glasses containing soft drinks already made available on the table where they were at. According to the defence, the H I

respondent and his friend Che Muhammad Azrani bin Che Abdullah had consumed the drinks without realizing that they contained dangerous drugs.

[35] SP2 denied having been informed by the respondent as to the above facts. However SP4 in cross-examination admitted that there were liquor and coca cola drinks served on the table but none of the bottle drinks were confiscated. As such the respondent's story cannot be said to be untrue.

[36] Meanwhile SP5 as the investigating officer admitted in cross-examination that the respondent had informed her that he had consumed the drinks made available on the table where he was at when the raid took place at the premise and agreed that the respondent had exposed himself to the risk of being drugged. The testimony by SP5 was extracted by the learned magistrate and reproduced:

> PB: Inspektor kata hasil siasatan menyeluruh adalah kesan urin positif. Saya cadangkan tugas puan bukan untuk siasat apa dalam air kencing semata-mata. Tugas puan untuk pastikan suspek ada memasukkan dadah berbahaya dalam badan itu tugas puan.
>
> SP5: Setuju.
>
> PB: Saya cadangkan dalam siasatan puan, dalam persoalan itu sebagai IO puan boleh ambil kira kalau ada fakta boleh dipercayai untuk jelaskan bagaimana dadah itu boleh ada dalam air kencing itu selain dari laporan pegawai sains itu puan boleh ambil kira fakta lain.
>
> SP5: Setuju.
>
> PB: Ini berdasarkan arahan okt saya cadangkan okt ada ceritakan kepada puan bahawa beliau telah meminum minuman ringan yang tersedia terhidang di atas meja di pusat hiburan tersebut. Ada beliau maklumkan kepada puan.
>
> SP5: Ada Yang Arif.
>
> PB: Jadi pembelaan ada mungkin sebelum dia minum minuman itu ada mungkin orang nakal dah masukkan siap-siap dadah dalam minuman itu.
>
> SP5: Dia kata dia ada minum air di kelab tersebut, dan tidak maklumkan saya ada sesiapa letakkan dadah dalam air minuman beliau.
>
> PB: Saya cadangkan dia tidak bagitahu sebab dia tidak nampak siapa masukkan dadah dalam minuman itu. Itu cadangan kami. Kalau dia tahu dia tidak minum lah. Ada komen berdasarkan siasatan puan.
>
> SP5: Ikutkan dia tidak cerita pada saya ada orang masukkan dadah dalam minuman dia. Tetapi kebanyakan yang kita tahu, kalau dekat kelab ini, ada certain club air dia sediakan kadang-kadang dia telah letak.
>
> PB: Macam pelaris.
>
> SP5: Kalau OKT saya selalu tanya diaorang memang tahu. Bagi pihak Jarizal ni mungkin tidak tahu tapi dah terminum. Bagi saya dia tidak perlu pergi pun ke kelab tersebut.

PB: Saya cadangkan dia tidak pergi. Tapi dah terdedah dia minum dan dedahkan diri dia kepada risiko itu. Saya cadangkan OKT pergi ke tempat kejadian yang sepatutnya dia tidak pergi. Dia dedahkan risiko orang masukkan dadah dalam minuman.

SP5: Setuju.

[37] The respondent in his statement under s 112 of the Criminal Procedure Code had stated that it was the first time he had been to the premise when the raid took place. He had only consumed coke which was served at the material time. He denied having taken any drugs before and did not expect that his urine was positive with amphetamine.

[38] The respondent through his lawyer had also served on the investigating officer and the office of prosecution the alcontara notice dated 18 September 2020 and requested that his version of defence be investigated by the police. SP5 admitted having received the alcontara notice and that no further investigation was done thereafter.

[39] It is incumbent on the police to investigate both the allegation and the respondent's defence fairly and professionally. It cannot be said that the defence put up by the respondent is a belated defence. Timely disclosure have been made by the respondent and there is no evidence of delay on his part in offering an explanation. The respondent's 112 statement under the Criminal Procedure Code is made contemporaneously during the course of investigation and failure on the part of the police to investigate the respondent's defence adequately, adversely affect the prosecution's case. Even if there is a failure on the part of the respondent to put up his defence, it can never by itself relieve the prosecution of the duty of establishing the charge against the respondent on a prima facie basis at the prosecution's stage. This court finds that the learned magistrate has not erred in accepting the defence's version that there is evidence where inference can be made that dangerous drugs were added to the soft drinks consumed by the respondent without his knowledge. This court is of the considered view that it cannot be said that the respondent's version cannot be true. The prosecution must disprove this important part of the respondent's version of the facts which they did not. In those circumstances there is doubt as to whether the respondent did consume or administer dangerous drugs type MDMA to himself with mens rea or by statutory presumption. Accordingly the respondent was rightly acquitted at the close of the prosecution case on these grounds alone.

[40] In regards to the other grounds in the prosecution's petition, ie the findings of the learned magistrate that two urine sample bottles should have been taken by the police, this court finds that the learned magistrate could not be said to be completely in error. This court and the magistrate court are indeed

bound by the decisions in *Pendakwa Raya lwn Rosman bin Saprey dan satu lagi rayuan* [2018] 4 MLJ 139; [2019] 4 CLJ 767 (CA) and *Public Prosecutor v Ahmad Saiful Islam bin Mohamad* [2023] 2 MLJ 950; [2023] 2 CLJ 714 where in both cases, the Court of Appeal had decided that the failure of the police to collect the respondent's urine sample in two bottles was not fatal to the prosecution's case.

[41] However, in the instant case, the view taken by the learned magistrate was made on the grounds that there were two different results as to the type of drugs found in the same urine sample bottle of the respondent. The preliminary screening test conducted by SP2 on the respondent's urine sample was tested positive for amphetamine whilst in the report by SP3, the drugs found in the said same urine sample bottle was MDMA. In fact, in the laboratory report produced by SP3 (P7) it is stated that by using the gas chromatography mass spectrometry test, no amphetamine was found in the respondent's urine sample. No explanation was proffered by SP3 as to whether amphetamine and MDMA are the same type of drugs as well as to why or what could be the possibility as to the difference in the findings of the type of drugs during the preliminary screening test and the gas chromatography mass spectrometry test. This discrepancy is detrimental when there were allegations put to the prosecution witnesses that the seal that was said to have been put on urine sample bottle in the presence of the respondent with the specific number of the 'Bahagian Siasatan Jenayah Narkotik' (as per the evidence of SP2 and SP5) was not stated in P6 (*Borang Permintaan Ujian Saringan/Pengesahan Dadah Dalam Air Kencing*) and the said seal and the specific number cannot be seen from the photograph of the urine sample bottle in P2. No efforts on the part of the prosecution to explain these discrepancies through their witnesses. Therefore, on this ground too, this court cannot find fault in the findings of facts made by the learned magistrate in discharging and acquitting the respondent of the charge against him.

[42] The present appeal is substantially factual. The learned magistrate has considered and evaluated the evidence before her and rightly found that the prosecution has failed to prove a prima facie case against the respondent. This court finds no error that warrants appellate intervention. In any case, an appellate court should be slow in interfering with the trial court's findings of fact.

CONCLUSION

[43] Premised on the above, this court finds that it is not safe to convict the respondent on the said charge if defence is called and if he elects to remain silent based on the surrounding facts of this case.

[44] Therefore, this court dismissed the prosecution's appeal and affirmed the decision of the magistrate court in discharging and acquitting the respondent of the said charge preferred against him.

Appeal dismissed.

Reported by Ahmad Ismail